WASHINGTON STATE CRIMINAL JUSTICE TRAINING COMMISSION

Law Enforcement Digest

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HONOR ROLL

558th Session, Basic Law Enforcement Academy, Spokane Police Academy
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Highest Mock Scenes:	John M. Lammers – Spokane County Sheriff's Office
Outstanding Officer:	Juan B. Dorame, Jr. – Kennewick Police Department
Pistol Marksmanship:	Steven C. Steadman - Lincoln County Sheriff's Office
Overall Firearms:	Ryan L. Bonsen – Whatcom County Sheriff's Office
Tactical Firearms:	Ryan L. Bonsen – Whatcom County Sheriff's Office

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BRIEF NOTE FROM THE NINTH CIRCUIT COURT OF APPEALS

CITIZEN HAS NO DUTY TO ID HIMSELF DURING TERRY STOP -- DESPITE SUPPORTING NEVADA STATUTES, NINTH CIRCUIT HOLDS NEVADA OFFICER IS NOT ENTITLED TO QUALIFIED IMMUNITY FOR ARREST BASED ON SUSPECT'S FAILURE TO IDENTIFY HIMSELF DURING TERRY SEIZURE – In Carey v. Nevada Gaming Control Board, 279 F.3d 873 (9th Cir. 2002), the Ninth Circuit of the U.S. Court of Appeals holds that a Nevada Gaming Control Board Officer is not entitled to qualified immunity for arresting an individual pursuant to Nevada statutes that unconstitutionally require individuals detained during Terry stops to identify themselves.

The facts, excerpted from the Court's opinion, are as follows:

> . . . [P]laintiff James Carey, . . . and his friend, Ed Amsberry, were playing "21" at the Ramada Hotel and Casino in Laughlin, Nevada. Ramada employees suspected the two men of cheating and observed them closely. . . .
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> . . . Ramada personnel called Agent Gregory Spendlove of the Nevada Gaming Control Board to investigate whether Carey and Amsberry were cheating. Agent Spendlove watched the two patrons on closed-circuit television and reviewed videotapes of their play from the previous day, but was unable to determine at that time that any cheating had occurred. Spendlove decided further investigation was required. Carey and Amsberry left the casino, and Agent Spendlove instructed Ramada personnel to contact him if the two returned so he could further observe them.
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> Later that day, Carey and Amsberry returned. Ramada security detained them in the security office and called Agent Spendlove. Upon arriving, Agent Spendlove identified himself to Carey and Amsberry, indicated he was investigating possible violations of the gaming laws, and read them their Miranda rights. Spendlove also "Terry frisked" both detainees. Agent Spendlove then asked Carey and Amsberry

> to identify themselves. Carey refused. Agent Spendlove instructed Carey that he could identify himself either verbally or by showing identification. Carey again refused and asked to speak to a lawyer. Spendlove informed Carey that he could be arrested for refusing to identify himself, and gave him at least three opportunities to do so.
>
> In the meantime, Spendlove instructed both detainees to remove their shoes and socks. Spendlove searched both men's shoes, removing the insoles of Carey's shoes in the process. With Amsberry's consent, Spendlove and Ramada security searched the hotel room that Carey and Amsberry were sharing. After detaining Carey and Amsberry for between one and one and a half hours, Spendlove determined there was no probable cause to arrest either of them for violating the gaming laws. However, based on Carey's refusal to identify himself, Spendlove arrested Carey under the authority of two Nevada statutes which require individuals to provide information to peace officers under certain circumstances. Carey spent the night in jail. He was released the next morning, and no charges were brought against him.

Carey sued, among others, Agent Spendlove in his personal capacity. The Federal district court dismissed all parties, including Agent Spendlove, ruling as to Spendlove that he was entitled to qualified immunity under the Federal civil rights statute.

A Nevada statute implements the Fourth Amendment standard of Terry v. Ohio by allowing Nevada law enforcement officers (including Gaming Control agents) to detain individuals based on reasonable suspicion. Another statute requires that: "[a]ny person so detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer." Finally, a third statute makes it a misdemeanor for a person, "after due notice, [to] refuse or neglect to make or furnish any statement, report or information lawfully required of him by any public officer ... or [to] willfully hinder, delay or obstruct any public officer in the discharge of his official powers or duties." Read together, these statutes require individuals stopped pursuant to Terry to identify themselves to police, and the statutes make the failure to do so a misdemeanor. [Note: Washington does not have similar state statutes. LED Eds.]

The Carey Court: 1) states that the initial detention was constitutionally justified under Terry; and 2) that Agent Spendlove had probable cause to believe that Carey had violated the failure-to-identify provision of the Nevada statutes. However, the Court agrees with Carey's argument that the mandatory-identification portion of the statutes is unconstitutional. The Court therefore holds that Carey's Fourth Amendment rights were violated. The Ninth Circuit explains its Fourth Amendment holding as follows:

> In Lawson v. Kolender, 658 F.2d 1362 (9th Cir.1981), we invalidated a disorderly conduct statute that required individuals to identify themselves to police based on less than probable cause, holding that the statute was void for vagueness and that it violated the Fourth Amendment. . . .
>
> In addition, we reaffirmed the holding of Lawson in Martinelli v. City of Beaumont, 820 F.2d 1491 (9th Cir.1987). In Martinelli, the plaintiff was approached by officers who told her they were investigating an accident that may have involved her automobile. Despite the officers' repeated requests that the plaintiff identify herself, she refused, and was ultimately arrested for "delaying a lawful police investigation by refusing to identify herself." The officers relied on a state statute that criminalized willful resistance, delay or obstruction of any public officer in the discharge of his duties. Relying on Lawson, we held that arresting the plaintiff for refusing to identify herself during a Terry stop violated the Fourth Amendment.

[Citations omitted]

The Carey Court finds a violation of Carey's Fourth Amendment rights, ruling "[t]o the extent[the statutes] authorized Carey's arrest for refusing to identify himself, they are unconstitutional under the law of this circuit." Having found a constitutional violation, the Carey Court then considers whether the law was clearly established at the time of the arrest such that the officer would be entitled to qualified immunity from a Federal civil rights lawsuit. The Court determines that the law was clearly established and the agent should have known that arresting an individual for failing to identify himself was unlawful. The Carey Court explains:

> Although state officials who rely on statutes are generally presumed to act reasonably, an official may nevertheless be liable for enforcing a statute that is "patently violative of fundamental constitutional principles." Grossman, 33 F.3d at 1209; see also DeFillippo, 443 U.S. at 38 ("no qualified immunity if statute is "so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws").
>
> As discussed above, there are two Ninth Circuit cases directly on point, Lawson and Martinelli, which unambiguously hold that compelling an individual to identify himself during a Terry stop violates the Fourth Amendment. Those cases invalidated state statutes that authorized arrests based on the detained individual's refusal to identify himself. In addition, Lawson and Martinelli are in accord with Supreme Court pronouncements on this issue. The Court has consistently recognized that a person detained pursuant to Terry "'is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest.'"

[Citations omitted]

The Ninth Circuit concludes that, even though Federal courts in several other circuits have ruled differently on the constitutionality of an arrest for not providing ID during a Terry stop, "a reasonable officer in Spendlove's position would have known that Carey had a clearly established Fourth Amendment right not to identify himself, and that the Nevada statutes at issue, like the statutes in Lawson and Martinelli, were unconstitutional to the extent they allowed Carey to be arrested for exercising his rights."

Result: Reversal of Nevada U.S. District Court summary judgment order granting qualified immunity to the agent and dismissing Carey's claims; case remanded for trial.

LED EDITORIAL COMMENTS: Even though the State of Washington does not have a statute expressly making it a crime to identify oneself during a Terry stop, we occasionally get questions as to whether Terry seizure detainees held on reasonable suspicion can be arrested for "obstructing" for refusing to identify themselves. The answer is that, even if the language of the Washington "obstructing" statute could be stretched this far, the constitutional analysis in Carey precludes such application. See also State v. White, 97 Wn.2d 92 (1982) (The White decision is cited by the Carey Court).

Note, however, that it is constitutional to arrest a Terry detainee for giving false information in response to an officer's request that the person voluntarily identify himself or that he voluntarily provide other information. See RCW 9A.76.175. Note, also that traffic statutes, such as RCW 46.61.021, requiring that drivers carry licenses and display such licenses on demand during traffic stops, are distinguishable from and not impacted by the Carey Court's constitutional analysis of non-traffic, stop-and-identify statutes.

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BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT

RANDOM CHECKING OF LICENSE PLATES AND OBTAINING DOL INFORMATION DOES NOT VIOLATE THE WASHINGTON CONSTITUTION'S ARTICLE ONE, SECTION SEVEN -- In State v. McKinney, __ Wn.2d __, __ P.3d __ (2002) (2002 WL 3178829), the Washington Supreme Court unanimously rules that there is no state constitutional privacy protection against law enforcement officers randomly checking license plates for information in the Department of Licensing (DOL) database. The Supreme Court decision affirms the decision of Division One in three consolidated cases. The facts in the consolidated cases were previously summarized in the August 2001 LED entry reporting on the 2001 Court of Appeals decision in the consolidated cases. The facts in the three cases are as follows:

McKinney case: A Federal Way police officer randomly ran a DOL check on the license number of a vehicle parked at an AM/PM market. DOL records showed that the registered owner, Lonnie McKinney, had a suspended driver's license. The person who drove the vehicle from the market parking lot met the DOL description of McKinney. The officer pulled the vehicle over. After arresting McKinney for driving while suspended, the officer determined that a woman in the vehicle was McKinney's wife, and that there were two DV "no-contact" orders prohibiting McKinney's contact with his wife. McKinney was charged with and convicted of violating the no-contact orders.

Martin case: A Seattle police officer followed up a citizen tip regarding possible illegal drug activity by a man driving a pickup truck with a specified license number. The officer ran the number through the DOL database, and then ran "Ralph Martin," the registered owner's name, through the WACIC database. Martin was shown as having two outstanding arrest warrants. Officers went to Martin's residence and arrested him in his driveway on the outstanding arrest warrants. A search incident to arrest yielded cocaine. Martin was charged with and convicted of cocaine possession.

Schroeder case: An Everett police officer doing a random DOL-WACIC check against license plates of vehicles in a hotel parking lot determined that the registered owners of two vehicles parked side-by-side were, respectively, a husband and wife. There was an outstanding DV protection order in WACIC prohibiting the husband Randal Schroeder from having contact with his wife. On further investigation, the officer found Schroeder in a motel room with his wife. Schroeder was charged and convicted of violating the DV protection order.

Recognizing that the Fourth Amendment of the U.S. Constitution does not provide any privacy protection precluding random, warrantless law enforcement access to DOL data, the defendants in the consolidated cases (McKinney, Martin and Schroeder) each argued that article 1, section 7 of the Washington constitution provides such privacy protection. In cases over the last 20 years, the Washington Supreme Court has found that the Washington constitution provides greater privacy protection than the Fourth Amendment in certain circumstances. For instance, the Washington Supreme Court has ruled that Washington citizens continue to have state constitutional privacy protection in the contents of their non-communal garbage cans after they leave them at curbside for pickup (see State v. Boland, 115 Wn.2d 571 (1990)), and that phone customers have state constitutional privacy protection in their long distance toll records (see State v. Gunwall, 106 Wn.2d 54 (1986)).

The Supreme Court's McKinney opinion indicates that the two most important factors in determining whether the Washington constitution provides greater privacy protection against warrantless law enforcement searches than is provided by the Fourth Amendment are: (1) what the information sought by law enforcement might reveal about a person's activities, associations with other people, and beliefs; and (2) what level of privacy protection has been historically provided under Washington law for the type of information.

The McKinney Court concludes that the information that officers access from the DOL database is not such personal information that it requires special protection against warrantless law enforcement access. The Court finds support for its ruling in the fact that Washington statutes over a long history have allowed unrestricted access to DOL information. It has only been in the last decade that any statutory restrictions have been placed on even citizen access to such information, and those modern statutory restrictions do not apply to law enforcement access.

Result: Affirmance of King County Superior Court convictions of Ralph Matthew Martin (cocaine possession) and Lonnie D. McKinney (no-contact order violation); affirmance of Snohomish County Superior Court conviction of Randal Dale Schroeder (protection order violation).

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WASHINGTON STATE COURT OF APPEALS

WHERE OFFICERS WERE EXECUTING SEARCH WARRANT AUTHORIZING ARREST OF RESIDENT ON FELONY WARRANTS, AND OFFICERS HAD ALREADY MADE ARREST, "PROTECTIVE SWEEP" OF OUTBUILDINGS WAS NOT JUSTIFIED BY ANY OTHER FACTS

State v. Hopkins, State v. Smith (Russell A.) ___ Wn. App. ___, 55 P.3d 691 (Div. III, 2002)

Facts and Proceedings below: (Excerpted from Court of Appeals opinion)

> On September 22, 2000, about seven Benton County sheriff's deputies went to Ms. Hopkins' rural property to arrest her on outstanding felony warrants. The officers also had with them a search warrant to enter Ms. Hopkins' property "and there diligently search for [her], to include any and all out buildings or trailers located on the property and any document, paperwork, identification cards, mail and/or personal property pertaining to Cheryl Hopkins."
>
> Arriving at the scene in four or five patrol cars, the deputies saw two men standing near a shed. One man said something to the other, went inside the shed, and then came back out. [Deputy A] jumped out of his patrol car, announced that he had a warrant, and officers secured the two men by placing them on the ground in handcuffs. The officers then went to the mobile home where Ms. Hopkins lived and arrested her without incident.
>
> [Two deputies] then went into the shed "just to do a security check to make sure there were no other individuals inside." [Deputy A] testified:
>
> > We wanted to do, for our own security, a security sweep. Methamphetamine, as you know, is a stimulant and people can get, when they get high, can get pretty aggressive and mean. I've seen people that are docile but pretty much aggressive. We have no idea what we're gonna run into gun-wise, you know, with people. So we're gonna go ahead and enter that shed and secure it. We're going specifically in there looking for people.
>
> Inside the shed, the officers saw a 3- by 5-foot floor freezer, big enough to hide a person inside. One of the officers opened the freezer, smelled ammonia, and saw methamphetamine lab-related items.

[Deputy A] then testified:

> At this point, I went around the back side of the shed where there is a trailer. The door was wide open in the trailer. We decided we better clear that to make sure we don't have additional people. There are people that go to the residence at different times. There is a lot of people and sometimes there is not a lot of people, it just depends what time of day it is. We just decided to go inside the trailer to secure that.

[Another deputy] testified the sweep was necessary to "make sure that the areas that we were standing directly in front of were clear of any potential threats." When asked to explain what he meant by "potential threats," the deputy testified:

> Somebody hiding in one of the sheds. Could be hiding outside in one of the areas beside the shed. There was a lot of just kind of stuff stacked up around this place and there's dog kennels behind the shed and things like that. So just to make sure there was not somebody hiding there that could be a threat to us while we're working on finishing up and leaving [--] posting search warrants and things like that.

Inside the trailer, the officers saw more methamphetamine lab-related items. Based on these observations, the officers applied for and received a telephonic warrant to search for controlled substances and related items.

Ms. Hopkins and Mr. Smith were charged with manufacturing and possession of a controlled substance. The cases were consolidated for trial, and the defendants moved to suppress the evidence. After a CrR 3.6 hearing, the superior court denied the motion, concluding the officers were conducting a valid "protective sweep" when they saw the drug-related items in the shed and trailer.

The jury later convicted Ms. Hopkins and Mr. Smith on both counts.

ISSUE AND RULING: Did the officers' entry into the shed and trailer exceed the scope of a lawful "protective sweep"? (ANSWER: Yes)

Result: Reversal of Benton County Superior Court convictions of Cheryl L. Hopkins and Russell A. Smith for manufacturing and possession of methamphetamine.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> [T]he State points out that its officers had a valid warrant to search "all out buildings or trailers located on the property." But it is undisputed that the only basis for issuing the search warrant was the outstanding arrest warrants for Ms. Hopkins. Why the officers obtained a search warrant is not clear, because an arrest warrant, by itself, provides authority for the police to enter a person's residence to effectuate his or her arrest. *See* Payton v. New York, 445 U.S. 573 (1980) ("[A]n arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within."); *see also* RCW 10.31.040 ("To make an arrest in criminal actions, the officer may break open any outer or inner door, or windows of a dwelling house or other building . . . if, after notice of his office and purpose, he be refused admittance.").

Because the search warrant was issued only on the basis of the probable cause to *arrest* Ms. Hopkins, the search warrant's authority to search logically extends only to the areas authorized by the arrest warrants. To the extent the search warrant here authorized a search more extensive than permitted by the arrest warrants, it was invalid.

The State does not contend the arrest warrants *alone* justified the officers' entry into the shed and trailer. The burden therefore shifts to the State to establish the entry was nevertheless reasonable.

To satisfy this burden, the State contends the entry was a lawful "protective sweep" of the premises incident to Ms. Hopkins' arrest. While making a lawful arrest, officers may conduct a reasonable "protective sweep" of the premises for security purposes. Maryland v. Buie, 494 U.S. 325 (1990) **May 90 LED:02**. The scope of such a "sweep" is limited to a cursory visual inspection of places where a person may be hiding. If the area immediately adjoins the place of arrest, the police need not justify their actions by establishing a concern for their safety. However, when the "sweep" extends beyond this immediate area, "there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonable and prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene."

The State does not contend the shed and trailer were within the area immediately adjacent to the place where Ms. Hopkins was arrested. The issue, then, is whether, pursuant to Buie, the officers reasonably believed the shed and trailer harbored dangerous persons. Although the presence of the two men outside the shed may have posed a danger when the officers first arrived at the scene, those men and Ms. Hopkins had been secured before the "sweep" began. They thus no longer posed a danger to the arresting officers.

The only remaining possibility is that the officers feared that *other*, dangerous persons were in the shed or trailer. But a "general desire to be sure that no one is hiding in the place to be searched is not sufficient" to justify a protective sweep outside the immediate area where an arrest has occurred. [Two deputies] entered the shed "to make sure there were no other individuals inside." While the officers understood generally that methamphetamine users can be aggressive, the State presented no facts that would have led them reasonably to believe both that other persons actually were present and that those persons were methamphetamine users. Indeed, the facts suggest the deputies did not have even a *subjective* fear that other, dangerous persons were in the shed or trailer: One officer was left to watch the two men, who were being restrained near the shed, while the remaining six went to Ms. Hopkins' residence to arrest her.

The officers did not have a reasonable belief that the shed or the trailer harbored a dangerous person. The search of those areas thus was not a lawful "protective sweep" under Buie. Evidence seized as a result of the unlawful search should have been suppressed. The superior court's order is reversed.

[Some citations omitted]

BECAUSE INITIAL OBSERVATION OF MARIJUANA PATCH FROM ADJOINING PROPERTY WAS LAWFUL AND PROVIDED "INDEPENDENT SOURCE" FOR SEARCH WARRANT, FOLLOW-UP UNLAWFUL INTRUSION ONTO PROPERTY DID NOT REQUIRE SUPPRESSION OF EVIDENCE SUBSEQUENTLY SEIZED UNDER WARRANT

State v. Smith (Greg and Dina), ___ Wn. App. ___, 55 P.3d 686 (Div. III, 2002)

Facts and Proceedings below: (Excerpted from Court of Appeals opinion)

> While standing on adjoining property, Deputy Nick Dirks viewed a patch of marijuana plants growing on property occupied by Greg and Dina Smith. Later, Deputy Dirks, accompanied by two other officers, went to the Smith residence to request permission to search the property. When no one answered the door, Deputy Dirks left to obtain a search warrant while the other officers remained behind to secure the property; several other officers also arrived on the scene. While waiting for Deputy Dirks to return, officers walked about the property but did not enter the marijuana patch. When Deputy Dirks returned with a search warrant, marijuana plants were seized from the property and from inside the residence. The Smiths were charged with a violation of the uniform controlled substances act and manufacturing marijuana.
>
> [The trial] court denied the Smiths' motion to suppress the evidence obtained during the search. The court concluded that there was a lawful observation of the patch where the marijuana was growing and there was initially a lawful intrusion onto the property limited to those areas impliedly open to the public, i.e., the driveway as far west as the front door, a path to the front door, and the front porch. The court also determined that the search warrant was sought on the basis of the observations from the field.
>
> Significantly, the [trial] court also determined that before the search warrant was obtained, there were unlawful intrusions onto a portion of the property not impliedly open to the public. The [trial] court further concluded that these unlawful intrusions were for the purpose of observation only and that the observation constituted a search, not a seizure. Observing that the search was fruitless, the [trial] court stated it "added nothing to the observations lawfully made, was not exploited in any way, and resulted in no greater intrusion into the Defendant's property and private affairs than that lawfully made." The [trial] court found that the unlawful intrusions were "irrelevant to the process of obtaining the initial observation, obtaining the warrant, and serving the warrant." Additionally, the [trial] court determined that "[t]he officers who went to observe the marijuana patch did not do so in order to secure the premises, which was amply secured by the officers' presence in the driveway."
>
> After a bench trial on stipulated facts, the Smiths were convicted of a violation of the uniform controlled substances act and manufacturing marijuana.

ISSUE AND RULING: 1) Were the officers justified in going onto and walking around on the Smith property while waiting for a fellow officer to return with a search warrant? (ANSWER: No); 2) Is the warrant defensible under the "independent source" doctrine based on the initial observations from the property adjoining the Smith's property? (ANSWER: Yes)

Result: Affirmance of the Grant County Superior Court convictions of Dina Smith and Greg Ryan Smith.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) No justification for intrusion

The trial court concluded that the officers made unlawful intrusions onto portions of the property not open to the public. The trial court also concluded that "[t]he officers who went to observe the marijuana patch did not do so in order to secure the premises, which was amply secured by the officers' presence in the driveway." We agree with these conclusions. Nothing in the record supports the State's argument that the officers' intrusions beyond the area of the curtilage impliedly open to the public was necessary to secure the property. Simply put, the officers here made unlawful intrusions onto portions of the Smith property.

Examining the privacy interests affected here, the trial court determined that the officers' intrusions constituted a search, not a seizure. We agree. The officers' warrantless entry to those areas beyond the area of the curtilage open to the public violated the Smiths' privacy interests in addition to their possessory interests. Contrary to the arguments advanced by the State, the officers here made no real attempt to seize the Smith property from the outside. Hence, the officers' intrusions constituted an unreasonable warrantless search that was not excused under any of the exceptions to the warrant requirement.

2) "Independent source" rule

Evidence obtained through a source independent of a police error or constitutional violation is not subject to the exclusionary rule. Moreover, contrary to the Smiths' arguments, the independent source doctrine, like the inevitable discovery doctrine, does not offend the protections of article I, section 7 of the Washington Constitution. Hence, "[e]vidence will not be suppressed if it would have been acquired even without the lawful activity, or if the causal connection between its acquisition and the unlawful activity is attenuated."

Even if we assume that the marijuana plants were seized as part of the warrantless entry to the Smith property, these same plants would be subject to seizure as part of the search pursuant to a valid warrant. Suppression is not required under the independent source doctrine.

The Smiths also contend that suppression is required under State v. Bean, 89 Wn.2d 467 (1978) and State v. Ferro, 64 Wn. App. 181 (1992). These cases are also distinguishable.

In Bean, evidence was obtained pursuant to a warrant after police had unlawfully arrested a defendant and secured his home. The officers securing the home observed marijuana and pipes in plain view and informed the officer obtaining the warrant of this discovery. The trial court had suppressed the evidence seized prior to the securing of the warrant. The Washington Supreme Court went further concluding that the "initial entry into the house was wrongful and the subsequently obtained search warrant was not curative of the original illegal entry." The court's reasoning is not carefully explained, but it appears that the court based its decision on an analysis of the exigent circumstances exception to the warrant requirement--not the application of the independent source doctrine. Moreover, unlike the warrant here, the warrant in Bean was issued based, in part, on information obtained during the unlawful entry. Here, the officers roaming about the property did not uncover additional information that was used to obtain the search warrant.

In Ferro, officers engaged in aerial surveillance discovered marijuana growing in a wooded area and informed officers on the ground. These officers proceeded to the house near the location of the marijuana. When deputies arrived, one of the deputies got out of the vehicle and spoke to Ms. Ferro, but two other deputies drove across the property and then walked into the woods, and began seizing marijuana plants and placing them in their truck. In Ferro, no warrant was sought, obtained, or served. Ferro, like Bean, does not involve the application of the independent source doctrine.

In short, the court here did not err by admitting the evidence obtained from the Smith property. We affirm the Smiths' convictions.

[Some citations omitted]

NON-PRETEXTUAL VEHICLE STOP ON REASONABLE SUSPICION FOR "SEVERELY CRACKED WINDSHIELD" HELD LAWFUL

State v. Wayman-Burks, ___ Wn. App. ___. 56 P.3d 598 (Div. III, 2002)

Facts and Proceedings below: (Excerpted from Court of Appeals opinion)

On March 4, 2001, Officer Walters stopped a vehicle driven by Willy Davis because it had a "severely cracked windshield." Officer Walters learned that Mr. Davis had two outstanding arrest warrants and took him into custody. Ms. Wayman-Burks was a passenger.

Officer Walters searched the vehicle incident to Mr. Davis's arrest and found drug paraphernalia. The officer spoke with Ms. Wayman-Burks, who struggled with him. He found a syringe loaded with heroin on her person.

The State charged Ms. Wayman-Burks with unlawful possession of a controlled substance - heroin. Claiming the cracked windshield was not an obstruction upon the windshield under RCW 46.37.410, she moved to suppress the evidence because the officer was thus not entitled to stop the vehicle. The court denied her motion.

Ms. Wayman-Burks was convicted after a stipulated facts trial.

ISSUE AND RULING: Did the officer lawfully stop the vehicle based on the officer's observation of the severely cracked windshield? (ANSWER: Yes)

ANALYSIS: (Excerpted from Court of Appeals opinion)

RCW 46.61.021(2) authorizes officers to detain persons for traffic infractions "for a reasonable period of time necessary to identify the person, check for outstanding warrants, check the status of the person's license, insurance identification card, and the vehicle's registration, and complete and issue a notice of traffic infraction." A traffic detention is a seizure and must have been justified in its inception to be lawful. The detention thus must be based on "a well founded suspicion based on objective facts" that the person is violating the law. State v. Sieler, 95 Wn.2d 43 (1980); *see* State v. Duncan, 146 Wn.2d 166 (2002) **June 02 LED:17** (Terry stop for traffic infraction is lawful). An officer's suspicions will justify a search only if he can "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion."

RCW 46.37.010(1) provides in pertinent part:

> It is a traffic infraction for any person to drive or move or for the owner to cause or knowingly permit to be driven or moved on any highway any vehicle or combination of vehicles which is in such unsafe condition as to endanger any person.

This statute and RCW 46.61.021 authorize an officer to stop the driver of a vehicle whose windshield is in such an unsafe condition as to endanger any person. *[COURT'S FOOTNOTE: The trial court based its decision on reading* RCW 46.37.410(2) *in conjunction with* RCW 46.37.010(1)*. However,* RCW 46.37.410(2) *deals with materials placed "upon" a windshield. Because the crack is a defect in the windshield itself,* RCW 46.37.410(2) *does not apply.]*

RCW 46.37.010(1) permitted the officer to make the stop. Officer Walker's conduct was objectively reasonable, and Ms. Wayman-Burks has not presented evidence that the officer had another, subjective reason to initiate the stop. The record therefore contains no indication that the stop was "pretextual." See State v. Ladson, 138 Wn.2d 343 (1999). The trial court properly denied the motion to suppress and admitted into evidence the heroin found on Ms. Wayman-Burks.

[Some citations omitted]

UNDER "PHYSICAL CONTROL" STATUTE'S DEFENSE FOR MOVING VEHICLE OFF ROADWAY, DEFENDANT NEED NOT HAVE MOVED VEHICLE WHILE INTOXICATED

Belasco v. City of Tacoma, ___ Wn. App. ___, 56 P.3d 618 (Div. II, 2002)

Facts and Proceedings below: (Excerpted from Court of Appeals opinion)

> Tacoma city police officer Sandra Hawkins found Belasco asleep in his car one evening in early December 1999. He was parked on South 54th Street near the South Tacoma Way intersection outside the Airport Tavern. The car was not running, but Hawkins testified that Belasco's keys were in the ignition.
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> At trial, Belasco did not dispute that he was intoxicated and stipulated to the blood alcohol concentration (BAC) test results showing that his blood alcohol level was .195 and .202.
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> Belasco's defense was that his car was "safely off the roadway," an affirmative defense to being in physical control of a vehicle under RCW 46.61.504(2). Belasco testified that he realized he was too drunk to drive when he left the tavern and got in his car, so he decided to sleep it off.
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> Belasco asked the court to give [an instruction that included the following language]:
>
> > *No person may be convicted of being in actual physical control while under the influence if he or she has moved the vehicle safely off the roadway before being pursued by a law enforcement officer.*
>
> Citing McGuire v. City of Seattle, 31 Wn. App. 438 (1982), the City objected to including the emphasized language that explained the statutory affirmative defense.

> The trial court agreed with the City's argument [and ruled that]: To benefit from the affirmative defense, a driver must first be driving under the influence and *then* move his vehicle to a safe place off the road. The court struck the affirmative defense language from the instruction.

ISSUE AND RULING: In order for a defendant charged under RCW 46.61.504 with "physical control while under the influence" to raise the defense of having "moved the vehicle safely off roadway," must the defendant have done the moving of the vehicle while under the influence? (ANSWER: No)

Result: Reversal of Pierce County Superior Court physical control conviction of Richard Belasco; remanded for possible re-trial.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> The [statutory] language at issue reads, "No person may be convicted under this section if, *prior to being pursued by a law enforcement officer, the person has moved the vehicle safely* off the roadway." RCW 46.61.504(2) (emphasis added). Relying on McGuire, the City argues that moving the vehicle safely off the roadway is an element that Belasco's evidence could not establish because he admitted that he did not move the car once he became intoxicated.
>
> But the statute requires only that the defendant move the vehicle before being pursued by a law enforcement officer. The statute does not address the timing of the intoxication; it addresses the timing of moving the car in relation to pursuit by law enforcement. Under a plain reading of the statute, Belasco was entitled to present the safely-off-the-roadway defense to the jury. The trial court erred in imposing as a condition of the defense that Belasco must have driven while intoxicated before moving his car safely off the roadway.
>
> Moreover, we are unable to accept the City's argument [which asserts]: To be eligible to use the safely-off-the-roadway affirmative defense, the defendant must first drive any amount of distance while intoxicated before moving the car safely off the roadway. Under the City's theory, to be eligible to assert the affirmative defenses, a defendant would have to prove that he first drove while intoxicated, a greater crime than that with which he is charged, and then prove that he moved the car safely off the roadway before law enforcement pursued him.
>
> [We] hold that a defendant need not have been driving while intoxicated in order to be eligible to assert the "safely-off-the-roadway" statutory defense to a charge of physical control. The trial court erred in prohibiting Belasco from arguing this defense to the jury. Therefore, we reverse the conviction and remand for further proceedings.

LED EDITORIAL NOTE: The analysis by Division Two of the Court of Appeals in Belasco does not appear to be consistent with that in State v. Votava, 109 Wn. App. 529 (Div. III, 2001) March 02 LED:17, where Division Three of the Court of Appeals held that the safely-off-the-roadway defense was not available where someone other than the defendant had done the moving of the vehicle. Review in Votava is pending in the Washington Supreme Court.

STATE-CONCEDED "SEIZURE" OF LATE-NIGHT SLEEPERS IN CAR AT DENNY'S RESTAURANT WAS NOT JUSTIFIED BY "COMMUNITY CARETAKING FUNCTION"; LATER STOP FOR TRAFFIC VIOLATION WAS "FRUIT" OF EARLIER UNLAWFUL "SEIZURE"

State v. Cerrillo, ___ Wn. App. ___, 54 P.3d 1250 (Div. III, 2002)

Facts and Proceedings below: (Excerpted from Court of Appeals opinion)

> Early one morning in April 1999, [a law enforcement officer] responded to a report of a suspicious vehicle parked near Denny's Restaurant in Moses Lake. He and another officer approached a parked pickup, saw two men asleep inside, and banged on the windows to wake the men up. [The officer] stood on the driver's side. Either he or the man in the driver's seat opened the door and [the officer] asked to see the man's identification. The man complied and proved to be Gerardo Cerrillo. Due in part to the odor of alcohol, [the officer] decided Mr. Cerrillo might be intoxicated. He told Mr. Cerrillo to "sleep it off" and not to drive.
>
> The officers left and [the officer] continued to patrol the area, keeping an eye out for the pickup. About 30 minutes later, he saw the pickup leaving the parking lot and followed. Only one person was in the vehicle at this time. [The officer] observed that the driver made a turn without using a signal, moved into a lane without using a signal, and "faded" from the inside lane to the outside lane while making a turn. When the officer activated his lights, the pickup pulled over. Mr. Cerrillo, who was driving, was arrested and charged with driving under the influence of alcohol.
>
> Before trial in district court, Mr. Cerrillo moved for dismissal pursuant to State v. Knapstad, 107 Wn.2d 346 (1986) (the trial court has inherent power to dismiss a case that is not supported by sufficient evidence). He argued that the officers were not authorized to stop him under any of the exceptions to the warrant requirement, including the community caretaking function. He further argued that the second stop was unavoidably tainted by the first unlawful seizure.
>
> [The officer] was the only witness to testify at the Knapstad hearing. He testified that he did not know who reported the "suspicious" vehicle and admitted he saw no evidence of a crime in or around the pickup. When asked if he would have pulled the pickup over if he had not had the prior contact, [the officer] responded, "I really can't say one way or the other. I've ma[d]e traffic stops for exactly the same thing." The trial court found that the initial contact was based on the radio report of a suspicious vehicle, and not on the observations of the officers. Noting that the only applicable exception to the warrant requirement was the community caretaking function, the trial court found no evidence that signs of distress or need for assistance justified the police intrusion. Further, the court found that the second stop was a pretext, based on information obtained from the initial, unlawful contact. All evidence from the two seizures was suppressed and the charge was dropped.
>
> The State appealed the district court's ruling to superior court, which affirmed.

ISSUE AND RULING: 1) Should the State be allowed to raise the issue of whether a "seizure" occurred in the initial contact at the Denny's Restaurant parking area? (ANSWER: No, the State conceded that a "seizure" occurred, and that concession by the State caused the lower court record, as well as the findings and conclusions, to fail to address this issue, thus making review of this new issue impossible); (**LED EDITORIAL COMMENT: If the officer merely tapped on the**

window to get the car occupants' attention (and did not instead -- as claimed by the defendant -- open the car door to get their attention), then it was a tactical error for the prosecutor not to argue at trial court that there was no "seizure." See State v. Knox, 86 Wn. App. 831 (Div. II, 1997) Oct 97 LED:12 (no "seizure" occurs where officer merely taps on the window or asks occupant of vehicle to voluntarily roll down the window). 2) Was the initial "seizure" (as conceded by the State) at Denny's justified under the police "community caretaking function"? (ANSWER: No); 3) Was the subsequent traffic stop the fruit of the earlier unlawful "seizure" (as conceded by the State) of Cerrillo? (ANSWER: Yes)

Result: Affirmance of Grant County Superior Court ruling affirming a suppression order by the Grant County District Court, thus requiring dismissal of charge of DUI against Geraldo Cerrillo.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) State concession on "seizure"

> In oral argument before this court, the State argued for the first time that the initial contact between [the officer] and Mr. Cerrillo did not rise to the level of a seizure. This issue was not addressed at district court, at superior court, or in the appellate brief. In its presentation at the Knapstad hearing, the State apparently conceded that the stop was a warrantless seizure, and confined its arguments to the application of exceptions to the warrant requirement. This court may refuse to review any issue that was not raised in the trial court. Because the trial court's findings of fact and conclusions of law do not address the factors relevant to whether this encounter constituted a seizure, we find insufficient record for review of this issue. Consequently, we confine our review to the State's briefed arguments that the initial stop was a community caretaking function and the second stop was independently justified on the basis of Mr. Cerrillo's traffic infractions. **[LED EDITORIAL COMMENT: See our Comment above in the description of the "Issues" in this case.]**

2) Community caretaking function

> As discussed in State v. Kinzy, 141 Wn.2d 373 (2000) **Sept 00 LED:07**, the community caretaking function exception usually applies to police encounters involving emergency aid and routine checks on health and safety. Such encounters must be totally divorced from a criminal investigation. The emergency aid function applies when an officer subjectively and reasonably believes someone needs health or safety assistance and there is a reasonable basis to associate the emergency need with the place searched. [The officer] admitted he saw no indication that the occupants of the pickup needed assistance and he did not claim that emergency assistance was the basis for his intrusion. His reasons for initially contacting Mr. Cerrillo more closely resemble the "routine check on health and safety" aspect of the community caretaking function.
>
> When an officer claims that he or she stopped someone on a routine safety check, the determination of the stop's reasonableness depends on a balancing of the individual's interest in freedom from police interference against the public's interest in the community caretaking function. Even a routine stop for a safety check, if it involves a seizure, must be necessary and strictly relevant to the noncriminal investigation. Once the reasons for initiating the encounter are dispelled, the noncriminal investigation must end.

When [the officer] arrived at the parking lot, he saw nothing unusual and had no indication anything was wrong with the sleeping occupants of the pickup. Nevertheless, he approached with another officer -- one to each door -- and knocked on the window. He then either opened the door himself or had Mr. Cerrillo open the door, and he requested Mr. Cerrillo's identification. The only testimony regarding the purpose of the stop was [the officer's] statement that he was called to the scene to investigate a "suspicious vehicle." From the outset, the purpose of the stop suggests strongly that the officer was investigating possible criminal activity. Considering the community caretaking function's strict separation from criminal investigation, [the officer's] intrusion exceeded the scope of a community caretaking function. Consequently, the warrantless seizure was not justified under any exception.

3) Fruit of unlawful seizure

The critical question is whether exploitation of the police illegality is at least the "but for" cause of the discovery of evidence against the defendant. Here, the State argues that even if the initial stop was unlawful, the second stop was based on intervening observations of traffic infractions.

The trial court found that [the officer] would not have initiated the second seizure without the information gathered from the initial seizure. [The officer's] own testimony supports this finding. As he readily admitted, he could not say whether he would have pulled over the pickup if he had not had prior contact with Mr. Cerrillo. Although he had made traffic stops for the same infractions before, in this instance he had been keeping the pickup under observation because he suspected Mr. Cerrillo would attempt to drive while intoxicated. Clearly the earlier observation that Mr. Cerrillo appeared to have been drinking was a key consideration in [the officer's] subsequent decision to stop the pickup.

In summary, the trial court's decision that the initial stop did not qualify as a Terry stop or as a community caretaking function exception is supported by the evidence, as is the trial court's conclusion that the second stop was an exploitation of the information obtained in the first stop. Accordingly, the trial court properly excluded all evidence obtained in the two stops and dismissed the charge.

[Some citations omitted]

EVIDENCE THAT MAN WAS BRIEFLY OBSERVED WALKING WITH WOMAN PROTECTED BY NO-CONTACT ORDER AGAINST HIM WAS SUFFICIENT TO SUPPORT HIS CONVICTION FOR VIOLATING THE ORDER

State v. Sisemore, ___ Wn. App. ___, 55 P.3d 1178 (Div. II, 2002)

Facts and Proceedings below: (Excerpted from Court of Appeals opinion)

Officer Elton briefly saw Paul Sisemore walking with Susie Cuny. Elton drove up behind the pair and watched them for no more than two to three seconds. Nonetheless, Elton was certain of their identities. Elton drove past them and parked at "their house." He verified the no contact order and then tried to find Sisemore and Cuny, but could not. Sisemore was later arrested for violating the no contact order.

> After a bench trial, the trial court found Sisemore guilty of violating the no contact order. The court did not believe Cuny's testimony that she had last seen Sisemore several months before their alleged contact. It found that Sisemore and Cuny were walking together and, thus, that Sisemore knowingly violated the no contact order.

ISSUE AND RULING: Is there sufficient evidence in the record to support Sisemore's conviction for violating the no-contact order? (ANSWER: Yes)

Result: Affirmance of Kitsap County Superior Court conviction of Paul Sisemore for violating a no-contact order.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> The State had to show that Sisemore knew the order existed and willfully, that is, knowingly and intentionally, contacted or remained in contact with Cuny. RCW 26.50.110(2); 10.99.050(2)(a); 9A.08.010(4).
>
> The trial court found that Sisemore knew the order had been issued and was in effect. The court also found that he knowingly violated the order because he was "walking together" with Cuny. [A]though the time period was brief, the evidence was sufficient to support a finding that Sisemore was knowingly and intentionally in contact with Cuny.
>
> But Sisemore argues that there is "no evidence whether Mr. Sisemore approached [Cuny], whether she approached him, or whether the meeting was by happenstance." The statute, however, does not require the State to prove who made the initial contact. Sisemore violates the statute if he knowingly and intentionally maintained contact that started accidentally or by happenstance. And the court's finding that Sisemore was walking with Cuny is sufficient to support the legal conclusion that Sisemore's contact was willful. In addition, Sisemore did not defend on the basis of an accidental contact. Instead, he offered Cuny's testimony that she was not the woman the officer saw with him. The trial court was entitled to consider this in deciding whether Sisemore's contact was willful.
>
> Viewing the evidence most favorably to the State, Sisemore knew he was prohibited from contacting Cuny, yet chose to walk down the street with her. This is sufficient to convict Sisemore of violating the statute.

[Some citations omitted]

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) OFFICER'S TESTIMONY COMMENTING ON DEFENDANT'S PRE-TRIAL EXERCISE OF HIS RIGHT TO SILENCE HELD TO REQUIRE REVERSAL OF CONVICTION – In State v. Romero, 113 Wn. App. 779 (Div. III, 2002), the Court of Appeals rules that an officer infringed on a defendant 's constitutional right to remain silent when, during questioning at trial regarding what had occurred following defendant's arrest, the officer testified that the defendant had chosen not to waive his Miranda rights and had chosen not to talk to the officer.

Police responded to a "shots fired" call. Witnesses told police Isaias Ramirez Romero was the person who they had seen firing a shotgun. Following his arrest, Romero chose not to talk to the officers.

At trial, the deputy prosecutor asked one of the officers an open-ended question regarding what happened following Romero's arrest. The officer answered (and the defense attorney objected) as follows:

> Q (Prosecutor): Okay. And what happened there?
>
> A (Officer): I brought him into the station and put him in the holding cell, he was somewhat uncooperative, so –
>
> [Defense Counsel]: Your Honor, I would object, I previously objected to that.
>
> The Court: Just respond to the question, sir, please.
>
> A (Officer): Okay, we put him into the holding cell, I read him his Miranda warnings, which he chose not to waive, would not talk to me.

The Romero opinion includes comprehensive analysis of the case law regarding restrictions on testimony commenting a defendant's pre-trial exercise of his or her Fifth Amendment right to remain silent. The Romero Court concludes that, even though the deputy prosecutor apparently did not deliberately elicit or subsequently exploit the officer's response, the officer likely intended to undermine Romero's defense. Primarily for that reason, the Court finds a constitutional violation in the officer's testimony. Finally, the Romero Court rules that the case must be re-tried, because the constitutional error was not harmless under the totality of the circumstances.

Result: Reversal of Yakima County Superior Court conviction of Isaias Ramirez Romero for unlawfully possessing a firearm in violation of RCW 9.41.040; case remanded for re-trial.

LED EDITORIAL NOTE: Officers should proceed with caution when testifying regarding defendants who have exercised their right to remain silent at some point during the investigation. It is a good idea to consult the trial deputy on this issue prior to testifying.

(2) THREAT-TO-KILL FELONY HARASSMENT EVIDENCE HELD SUFFICIENT TO SUPPORT CONVICTION EVEN THOUGH TARGET DID NOT FEAR DEATH – In State v. C.G., ___ Wn. App. ___, 55 P.3d 1204 (Div. I, 2002), the Court of Appeals affirms a high school student's convictions for felony harassment for her threats against a teacher and a police officer.

On appeal, the student, C.G., challenged only her conviction for harassment of the teacher. The C.G. Court describes as follows the facts and trial court proceedings relating to that conviction:

> On January 30, 2001, C.G. was a student at Blaine High School. That afternoon, a teaching assistant asked her about a pencil that was missing from her desk. C.G. became angry. She complained that she was being falsely accused of taking the pencil. Her anger escalated as class continued. She ignored the teaching assistant's requests to calm down. When C.G. began using profanity in the classroom, the teaching assistant ordered her to sit at a study carrel for a "time out".
>
> During the "time out", C.G. continued to be disruptive. She kicked the carrel, moved her chair and made other noise. The teaching assistant then called the school's vice-principal, Tim Haney, who is responsible for disciplinary matters at the school.

> Haney asked C.G. to accompany him out of the classroom. After some resistance, she agreed but continued to yell obscenities. Haney called another teacher for assistance. At this point, C.G. said to Haney, "I'll kill you Mr. Haney, I'll kill you!"
>
> The State charged C.G. with two counts of felony harassment for the threats made to Haney and [the arresting officer]. The State also charged her with one count of intimidating a public servant for the threats she made to Officer Glover after she kicked his patrol car.
>
> At the hearing, Haney testified that C.G.'s threat caused him concern. Haney testified that, based on what he knew about her, he felt it was "very likely" that she might try to harm him or someone else in the future.
>
> The trial court found C.G. guilty on both counts of felony harassment, while acquitting her of the charge of intimidating a public servant.

The C.G. Court then describes the argument posed by C.G. and sets forth its analysis rejecting that argument as follows:

> Washington's harassment statute, RCW 9A.46.020, makes it a felony to threaten to kill another through words or conduct that place the victim in reasonable fear that "the threat" will be carried out….
>
> C.G. claims that a conviction under RCW 9A.46.020 requires proof that the person threatened was in reasonable fear that the literal threat made will be carried out. She contends there was insufficient evidence to convict her because Haney testified that he reasonably feared C.G. might harm him, rather than testifying that he reasonably feared she would kill him.
>
> The case C.G. relies on is State v. Binkin, 79 Wn. App. 284 (1995). The appellant in Binkin, convicted of a threat to kill, argued that a prior threat he made should not have been admitted because it was irrelevant and prejudicial. Rejecting that argument, we held the prior threat was relevant because the State "had to prove that it was reasonable for Zena to fear that Binkin would kill her." This statement supports C.G.'s argument only when read out of context. Binkin's holding reflects the need for proof that the victim's fear was reasonable, not any need to prove the victim believed the literal threat would be carried out.
>
> In State v. Savaria, 82 Wn. App. 832 (1996) **March 97 LED:19**, we rejected an argument similar to the one made by C.G. Savaria argued that the victim of his threat to kill did not actually believe that Savaria would kill her. We concluded that the victim need not believe the literal threat will be carried out, but need only fear harm will occur in one of the four general ways outlined in the statute: physical injury, restraint, property damage, or other malicious act intended to cause substantial harm.
>
> Haney testified that C.G.'s threat to kill him caused him concern, and he felt it was "very likely" she might try to harm him or someone else at some point. He knew she had made serious threats to others in the past and had assaulted students, school staff and Blaine police officers. Haney felt he was a visible resident of the Blaine community, and in a vulnerable position because of his responsibilities for student discipline. Viewed in the light most favorable to the

> State, this evidence was sufficient for a reasonable trier of fact to find beyond a reasonable doubt that C.G.'s threat placed Haney in reasonable fear that she would cause him bodily injury.

[Some text, some citations omitted]

Result: Affirmance of Whatcom County Superior Court [juvenile] conviction of C.G. (Crystal Griffin) for felony harassment (two counts).

(3) FELONY HARASSMENT CONVICTION OF JUVENILE WHO THREATENED AT SCHOOL TO "DO LIKE COLUMBINE" UPHELD AGAINST HIS FREE SPEECH AND STATUTE-BASED CHALLENGES – In State v. E.J.Y., ___ Wn. App. ___, 55 P.3d 673 (Div. I, 2002), the Court of Appeals rejects a middle school student's constitutional and other challenges to his conviction for felony harassment.

The E.J.Y. Court describes the facts and trial court proceedings as follows:

> Fourteen-year-old E.J.Y. attended middle school. He was placed in a special education services classroom for the first two periods of his school day because of his learning and behavioral disabilities. One morning, the school was administering standardized tests. Because he was not participating in the tests, he was required to return to the special education class for his third period. This upset him and he left the class to complain to the school counselor, Darin Greer. He told Greer that he was not going to return to class and would rather go home.
>
> E.J.Y. then left Greer's office and walked down the hall toward the main office where he came into contact with Ezella Rosier, an attendance specialist. When he was about five feet away from her she heard him say, "I think I should go get my gun and do like Columbine . . . ." Rosier told E.J.Y., "I heard what [you] said [and] you should not be saying those kinds of things." Greer then approached the two and heard E.J.Y. chanting "Columbine, Columbine, Columbine." E.J.Y. then said, "You're going to have another Columbine around here, you guys better watch out. It's not just white boys that go off, I might do it, too."
>
> E.J.Y. then left the office area and Greer followed him until he left the school grounds. Later, Greer wrote a report of the incident and gave it to the vice-principal. Rosier followed with a written report of her own.
>
> E.J.Y. was subsequently charged with the offense of felony harassment in violation of RCW 9A.46.020.
>
> At the fact finding hearing, both Greer and Rosier testified that the statements made by E.J.Y. frightened them. E.J.Y. was subsequently found guilty as charged and received a standard range sentence.

The E.J.Y. Court then sets forth extensive analysis (not addressed here) rejecting the juvenile defendant's "free speech" constitutional challenge to the harassment statute. Next, the Court rejects the defendant's statute-based challenge to his harassment conviction under the following analysis:

> E.J.Y argues that the court ignored the element of "knowingly threatens" in RCW 9A.46.020. He is incorrect. The trial court was aware that a determination had to be made as to whether E.J.Y. actually, knowingly communicated a threat: "There is no question for this court that [E.J.Y] said [this threat] and directed it at [Greer and Rosier]." Nor was "there a question as to what his intent was." The court adequately addressed the element of E.J.Y.'s subjective intent.

> Finally we consider whether the State failed to prove that E.J.Y.'s words or conduct placed Greer and Rosier in reasonable fear. In a juvenile proceeding, as in an adult case, the evidence is sufficient to support an adjudication of guilt if any rational trier of fact, viewing the evidence in the light most favorable to the State, could find all the essential elements of the crime charged beyond a reasonable doubt. A claim of insufficiency "admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." The reviewing court must defer to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of the evidence.
>
> RCW 9A.46.020(1)(b) requires that the defendant by "words or conduct places the person threatened in reasonable fear that the threat will be carried out." The person threatened must subjectively feel fear and that fear must be reasonable. "Assuming the evidence established the victim's subjective fear, the issue is whether a rational trier of fact, viewing the evidence in the light most favorable to the State, could have found beyond a reasonable doubt, using an objective standard, that the victim's fear . . . was reasonable."
>
> E.J.Y. told Greer, "You're going to have another Columbine around here, you guys better watch out. It's not just the white boys that go off, I might do it, too." Greer testified that "I was concerned that [E.J.Y.] was making a threat that he could come back in and cause violence whether he was going to come back and shoot up the place . . . ." Viewing the evidence in the light most favorable to the State, this is sufficient for a rational trier of fact to find that Greer was subjectively afraid. The same is true for Rosier who testified that she felt "a little frightened" because she had heard reports about a shooting in California in which a student had been making references to the Columbine shooting incident prior to the assault. She also testified that because of E.J.Y.'s facial expression, she felt he was upset and believed E.J.Y had meant what he said. Again, this is sufficient for a rational trier of fact to find that Rosier was subjectively afraid.
>
> E.J.Y. counters that because Greer did not inhibit the juvenile's action after the statements, Greer's fear was not reasonable. Similarly, he argues that Rosier's fear was not reasonable because she waited before filling out a formal report. But the statute does not require immediacy. And the court found that "[t]here could be nothing clearer to this court that both Ms. Rosier and Mr. Greer were concerned about the statements . . . his behavior was that of an angry person . . . ." The court concluded that "when those words were uttered they had the intended effect, that that was to create a reasonable fear that these threats could be carried out . . . ." The court in making these findings relied upon the words of E.J.Y., the victims' personal knowledge of E.J.Y., the victims' awareness of other incidents of school violence, and the actions of the victims' after hearing the threat. Accordingly, the court's findings are supported by the evidence.

[Some citations and text omitted]

Result: Affirmance of King County Superior Court (juvenile) conviction of E.J.Y. for felony harassment under RCW 9A.46.020.

(4) BANISHMENT FOR ONE YEAR FROM FOUR COUNTIES UPHELD BECAUSE IT WAS PART OF A PLEA BARGAIN – In State v. Phelps, 113 Wn. App. 347 (Div. II, 2002), the Court of Appeals upholds a sentencing provision that required a drug dealer to stay out of the counties of Clallam, Kitsap, Grays Harbor and Mason for one year on pain of having a dismissed drug charge refiled against him. While there are limits generally on courts issuing such banishment orders, the defendant waived any right to challenge his banishment, because he agreed to the condition in the plea bargain.

However, the Phelps Court strikes the part of the plea bargain under which Phelps agreed to extend the statute of limitations on the dismissed drug charge. Courts simply lack the authority to extend the statute of limitations set by the Legislature. Defendant cannot be required to live up to his bargain on this part of the agreement, the Phelps Court holds, because the trial court was without jurisdiction to impose the extension.

Result: Affirmance in part and reversal in part of sentence of Donald Bradford Phelps by Clallam County Superior Court.

(5) TENANT'S OPERATION OF METH LAB IN RENTAL HOUSE WAS "VANDALISM" COVERED UNDER INSURANCE POLICY – In Graff v. Allstate Insurance Company, 113 Wn. App. 799 (Div. II, 2002), Division Two of the Court of Appeals rules that a renter's operation of a meth lab was "vandalism" under the terms of a landlord's insurance policy with Allstate Insurance Company. Accordingly, Allstate should have covered the damage under the terms of the landlord's insurance policy. The Graff Court agrees with and follows the ruling of Division Three of the Court of Appeals in Bowers v. Farmers Ins. Exchange, 99 Wn. App. 41 (Div. III, 2000), where the Court of Appeals ruled similarly regarding an insurance policy's coverage for damage by a renter growing marijuana in a rental house.

Result: Affirmance of Pierce County Superior Court ruling in favor of insurance policyholder and landlord, Harry Graff.

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NEXT MONTH

The February 2003 **LED** will include entries on the December 12, 2002 Washington Supreme Court decisions in:

(1) All Around Underground, Inc. v. WSP, in which the Court holds in a 5-4 decision that WSP's administrative rule, WAC 204-96-010, mandating impoundment of vehicles under RCW 46.55.113, is not valid; the Court rules that the statute requires that WAC rules or local ordinances adopted under the statute cannot make impoundment mandatory, and that such ordinances and WAC rules instead must give officers discretion to consider reasonable alternatives in making impoundment decisions; and

2) City of Seattle v. Allison, in which the Court holds in a 6-3 decision that, in order to meet the foundational requirements for admissibility of breath test results, the prosecution is not required to prove the actual temperature of the simulator solution in DataMaster breath testing machines. To establish compliance with former WAC 448-13-040 and the foundation for admissibility of the breath test document, the prosecution need only present a breath test document that shows that the solution was within the specified range; in that circumstance, the document itself is prima facie evidence that the City complied with former WAC 448-13-040, and therefore satisfies the foundational requirements for admissibility of the document.

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INTERNET ACCESS TO COURT RULES & DECISIONS, TO RCW'S, AND TO WAC RULES

The Washington Office of the Administrator for the Courts maintains a web site with appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court. The address is [http://www.courts.wa.gov/]. Decisions issued in the preceding 90 days may be accessed by entering search terms, and decisions issued in the preceding 14 days may be more simply accessed through a separate link clearly designated. A website at [http://legalwa.org/] includes all Washington Court of Appeals opinions, as well as Washington State Supreme Court opinions from 1939 to the present. The site also includes links to the full

text of the RCW, WAC, and many Washington city and county municipal codes (the site is accessible directly at the address above or via a link on the Washington Courts' website). Washington Rules of Court (including rules for appellate courts, superior courts, and courts of limited jurisdiction) are accessible via links on the Courts' website or by going directly to [http://www.courts.wa.gov/rules].

Many United States Supreme Court opinions can be accessed at [http://supct.law.cornell.edu/supct]. This web site contains all U.S. Supreme Court opinions issued since 1990 and many significant opinions of the Court issued before 1990.

Easy access to relatively current Washington state agency administrative rules (including DOL rules in Title 308 WAC, WSP equipment rules at Title 204 WAC and State Toxicologist rules at WAC 448-15), as well as all RCW's current through January 2002, is at [http://slc.leg.wa.gov/]. Information about bills filed in 2002 Washington Legislature is at the same address -- look under "Washington State Legislature," "bill info," "house bill information/senate bill information," and use bill numbers to access information. Access to the "Washington State Register" for the most recent WAC amendments is at [http://slc.leg.wa.gov/wsr/register.htm]. In addition, a wide range of state government information can be accessed at [http://access.wa.gov]. The address for the Criminal Justice Training Commission's home page is [http://www.cjtc.state.wa.us], while the address for the Attorney General's Office home page is [http://www/wa/ago].

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The Law Enforcement Digest is co-edited by Senior Counsel John Wasberg and Assistant Attorney General Shannon Inglis, both of the Washington Attorney General's Office. Questions and comments regarding the content of the LED should be directed to Mr. Wasberg at (206) 464-6039; Fax (206) 587-4290; E Mail [johnw1@atg.wa.gov]. Questions regarding the distribution list or delivery of the LED should be directed to [ledemail@cjtc.state.wa.us]. LED editorial commentary and analysis of statutes and court decisions express the thinking of the writers and do not necessarily reflect the views of the Office of the Attorney General or the CJTC. The LED is published as a research source only. The LED does not purport to furnish legal advice. LED's from January 1992 forward are available via a link on the Commission's Internet Home Page at: [http://www.cjtc.state.wa.us].